UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DISTRICT

CIVIL MINUTES - GENERAL

Case No.: SA CV 00 -321 AHS (MLGx) Date: October 9, 2003

Title: Synergy Staffing, Inc., etc. v United States of America

PRESENT: HON. ALICEMARIE H. STOTLER, JUDGE (IN CHAMBERS)

Ellen Matheson	Not Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT: None

PROCEEDINGS: RULING DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Procedural History and Ruling

Defendant filed a Motion for Summary Judgment on August 1, 2003. On August 25, 2003, plaintiff filed an opposition thereto. On August 4, 2003, plaintiff filed a Motion for Summary Judgment, or Alternatively for Partial Summary Judgment. The Court scheduled oral arguments on these motions for September 8, 2004.

Plaintiff's counsel did not appear at the hearing and was unavailable to answer questions. Due to plaintiff's failure to appear, the Court took the matter under

submission on September 8, 2003. On September 23, 2003, plaintiff lodged an ex parte request for the Court to consider rebuttal argument. The ex parte request on September 29, 2003.

Based on the arguments set forth in the parties' papers and the court's own research, the Court grants defendant's Motion for Summary Judgment and denies plaintiff's Motion for Summary Judgment, or alternatively for Partial Summary Judgment. The Court further grants defendant's Request for Judicial Notice and denies plaintiff's Request for Judicial Notice.

II. Facts

Plaintiff is a California corporation that places individuals with firms as temporary employees. Beginning in 1988, the government assessed payroll tax penalties against plaintiff. Plaintiff alleges in its complaint, and in the instant motions, that it is entitled to refunds for penalties assessed in a number of taxable quarters. Pursuant to the Ninth Circuit's ruling in Synergy Staffing v United States Internal Revenue Service, 323 F. 3d 1157 (9th Cir 2003), this Court considers the penalties assessed in the third quarter of 1993, the last two quarters of 1995, the four quarters of 1996, the first three quarters of 1997, and the first and third quarters of 1998.

III. Discussion

The record of this case as well as the parties' papers reflects that defendant did assess payroll tax penalties during the quarters at issue. However, plaintiff is not entitled to a refund of these penalties. The IRS penalty assessments are presumed correct and the burden fails to plaintiff to demonstrate that the penalties were assessed in error. Welch v Helvering, 290 U.S. 111, 115, 54 S. Ct. 8, 9

(1933); United States v Molitar, 337 F.2d 917, 922 (9th Cir. 1964).

Plaintiff fails to meet this burden. Treasury Regulation §31.6302-1(l) requires a taxpayer to deposit the aggregate balance die on all reportable taxes for the period in questions. Thus, in this case, plaintiff was required to deposit the aggregate amount of taxes die each taxable quarter and not merely the amounts owed at the conclusion of a pay period. Treas. Reg. §31.6302-1. The limited evidence offered by plaintiff indicates that the designations on the face of the payroll checks were marked for specific payroll periods and not the taxable quarters at issue.

Prior to 1998 and the passage of Public Law 105-206, the Tax Code did not permit plaintiff to designate payments for individual pay periods and this the .cascading. quarterly penalties in the instant case were correctly assessed. Under the post 105-206 regime, taxpayers are now entitled to designate payment to particular pay period to avoid the triggering of 'cascading' penalties for balances due. In light of the law in place at the time of the assessments in this case, and the lack of other evidence which demonstrates plaintiff's correct tax liability, plaintiff is not entitled to a refund.

Plaintiff's Request for Judicial Notice of interest rate tables posted on www.IRS.gov is denied. Plaintiff fails to provide the Court with a copy of the IRS tables and this judicial notice is inappropriate. Fed. R. Evid. 201. Defendant's Request for Judicial Notice of transcripts filed on June 12, 2000, is granted.

IV. Conclusion

Plaintiff has failed to meet its burden to demonstrate that the facts and the applicable law at the time the dispute arose entitle it to a refund of tax penalties assessed from 1993 to 1998. Plaintiff has not offered admissible evidence that shows it fully paid the balance due

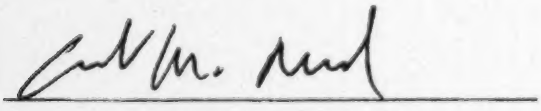
for each taxable quarter at issue. Thus, Defendant's Motion for Summary Judgment and Request for Judicial Notice are granted. Plaintiff' motion for Summary Judgment, or Alternatively for Partial Summary Judgment is denied. The Court has this date modified, signed and filed defendant's Proposed Summary Judgment and Statement of Uncontroverted Facts and Conclusions of law.

The Clerk shall serve this minute order on counsel for all parties in this action. Judgment for defendant shall be entered.

MINUTES FORM 11 INITIALS OF DEPUTY CLERK 's' KGP
CIVIL - GEN GBG

End of Appendix.

Respectfully submitted,



Andrew M. Rosenfeld

(2)

FILED
MAY 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1090

In the Supreme Court of the United States

SYNERGY STAFFING, INC., FKA
PERSONNEL CONNECTION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

In the Supreme Court of the United States

No. 05-1090

SYNERGY STAFFING, INC., FKA
PERSONNEL CONNECTION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 2, 4-5) that payroll tax deposits that it made during certain taxable quarters prior to, and including, the first taxable quarter of 1998 were misapplied by the Internal Revenue Service (IRS) because they were not applied to the specific payroll periods that petitioner designated on its deposit checks. The court of appeals held that petitioner's claim lacked merit because, during all times relevant to this case, "employers did not have the power to designate employee payroll tax deposits to [specific payroll] periods within a tax quarter." *Synergy Staffing, Inc.* v. *United States*, 134 Fed. Appx. 158, 158 (9th Cir. 2005) (citing 26 U.S.C. 6656(e)). That holding is correct and does not warrant further review by this Court.

1. During the pertinent period, petitioner, a corporation that provides temporary employee placement services, was required to deposit payroll taxes into an account at an approved bank each time that it paid its employees. *Synergy Staffing, Inc.* v. *United States IRS*, 323 F.3d 1157, 1158 (9th Cir. 2003); *Synergy Staffing, Inc.* v. *United States*, No. 00-321, Statement of Uncontroverted Facts and Conclusions of Law (Facts and Conclusions of Law) at 8 (C.D. Cal. Oct. 10, 2003) (citing 26 C.F.R. 31.6302-1(b) and (c)); Pet. 2. On a quarterly basis, petitioner was required to make a payment to the IRS of the withheld taxes. 26 C.F.R. 31.6011(a)-4(a)(1); 26 C.F.R. 31.6071(a)-1(a).

Beginning in 1988, on several occasions, petitioner failed to make the payroll tax deposits each pay period as required. *Synergy Staffing*, 323 F.3d at 1158; Pet. 2. Each time that petitioner was late with a deposit, it incurred a failure-to-deposit penalty pursuant to 26 U.S.C. 6656. *Synergy Staffing, Inc.* v. *United States*, No. 00-321, Minute Entry at 2 (C.D. Cal. Oct. 9, 2003); Facts and Conclusions of Law at 8 (citing 26 U.S.C. 6656(b)(2)(1988)).

During the third taxable quarter of 1997 and the first taxable quarter of 1998,* petitioner made several payroll tax deposits. Because they were not sufficient to cover all deposits due, petitioner "sought to prevent the imposition of additional penalties and interest" under Section 6656 by placing "an instruction on [it]s check to apply

---

* See Facts and Conclusions of Law at 5 ("Of the relevant payroll tax deposit checks exhibited by [petitioner] in this action, only the two checks for the third quarter of 1997 and the seven checks for the first quarter of 1998 include a reference on the face of each check to a particular payroll period within the quarterly tax return period to which the payroll tax deposit relates.").

the payment to current taxes." *Synergy Staffing*, 323 F.3d at 1158; see Pet. 2-3. If so applied, petitioner would still have owed the past-due amounts and the interest accruing on those amounts, but would have avoided new failure-to-deposit penalties by ensuring that currently due amounts were paid in full. See Pet. 3.

Then-existing law, however, did not allow employers to designate that payroll tax *deposits* be applied to a particular payroll period within a taxable quarter. *Synergy Staffing*, 134 Fed. Appx. at 158. The rule was different than that applicable to voluntary tax *payments*, which then-existing IRS policy allowed to be designated to a particular quarter. *United States* v. *Energy Res. Co.*, 495 U.S. 545, 548 (1990) (citing Rev. Rul. 79-284, 1979-2 C.B. 83. At that time, the IRS applied payroll deposits to the earliest payroll period in the taxable quarter for which amounts were due: "[D]eposits will be applied * * * against deposit liabilities in due-date order. Thus, a deposit will first be applied to satisfy any past due underdeposits within the same return period, with the oldest underdeposit being satisfied first." Rev. Proc. 90-58, 1990-2 C.B. 642. Accordingly, the IRS applied the deposits at issue here to the earliest-due payroll periods in the taxable quarter designated by petitioner, rather than to the currently due payroll period in that quarter. As a result, petitioner incurred new failure-to-deposit penalties with respect to each new payroll period.

2. In 1998, Congress decided to "[m]itigat[e] [the] failure to deposit penalty" by amending Section 6656 to "allow[] the taxpayer to designate the period to which each deposit is applied." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 259. That new approach would alleviate the "[c]ascading penalties" which resulted from then-

existing law when "payments that would otherwise be sufficient to satisfy current liabilities are applied to satisfy earlier shortfalls." *Ibid.*

The amendment to Section 6656 was enacted on July 22, 1998, and became effective 180 days thereafter. Taxpayer Bill of Rights 3, Pub. L. No. 105-206, Tit. III, § 3304, 112 Stat 742. The amended statute, as applied to deposits due after the effective date until December 31, 2001, 112 Stat. 743, authorized their designation to a particular payroll period within a tax quarter, and, as applied to deposits due after December 31, 2001, required that they be applied to the most recent payroll period within a tax quarter, unless designated otherwise. 112 Stat. 742; see 26 U.S.C. 6656(e)(1) (Supp. V 1999). Petitioner concedes that "[a]t the times material to this petition, Congress had not yet enacted 26 U.S.C. § 6656(e)." Pet. 1.

3. Petitioner nonetheless contends (Pet. 4) that, prior to the enactment of Section 6656(e), the IRS was required to apply payroll deposits as designated. Petitioner relies on *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990), but that decision is inapposite. In *Energy Resources*, this Court considered "IRS policy [that] permits taxpayers who 'voluntarily' submit *payments to the IRS* to designate the tax liability to which the payment will apply." *Id.* at 548 (citations omitted) (emphasis added). This case, by contrast, does not involve petitioner's quarterly tax *payments*, as each such payment was applied to the tax quarter that petitioner designated. See Facts and Conclusions of Law at 3 (finding that each check "which designated the payment to a particular taxable quarter was credited to the specified quarter"). The case instead involves petitioner's tax *deposits* into the approved bank account during that tax

quarter, each of which was applied to the earliest pay period during that quarter in accordance with then-existing law. Petitioner has cited no authority to support its position that, prior to the enactment of Section 6656(e), the IRS was required to apply tax deposits in the manner requested by the taxpayer. As the statute did not then specify the process to be used in applying payroll deposits, the agency had broad authority to "fashion [its] own rules of procedure." See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965)); *Cameron* v. *United States*, 252 U.S. 450, 460-463 (1920).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PAUL D. CLEMENT
Solicitor General

MAY 2006